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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 188

GEORGE GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals on appeal (R. 828-833) and denying rehearing (R. 855-857) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1951 (R. 833-834) and a petition for rehearing was denied on June 4, 1951 (R. 858). By order dated June 18, 1951, Mr. Justice Jackson extended the time for filing the petition for a writ

of certiorari to July 15, 1951 (R. 859), and the petition was filed on July 14, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the conviction of petitioner, who was shown to be an aider and abettor and co-conspirator, must be reversed because the indictment charged interstate transportation of counterfeit checks from the Southern District of New York and the proof shows that the direct interstate transportation began in the Eastern District of New York.

2. Whether the trial court erred in permitting a co-conspirator to testify that another co-conspirator told him, in petitioner's absence, that if anything went wrong, there was nothing to worry about because petitioner "was backing the deal," and, if so, whether the testimony was prejudicial where the jury was instructed that it was not to be used to prove the conspiracy but only as proof of "facts occurring in furtherance of the conspiracy."

STATUTES INVOLVED

18 U.S.C. 2:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done,

which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

18 U.S.C. 2314:

* * * * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any * * * counterfeited securities, knowing the same to have been * * * counterfeited; * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on counts eight, nine and ten of an indictment (R. 787), which charged him, respectively, with transporting from the Southern District of New York to Chicago in interstate commerce counterfeited American Express travelers checks; with transporting from the Southern District of New York to Los Angeles in interstate commerce counterfeited American Express travelers checks; and with conspiring to transport the counterfeited checks in interstate commerce (R. 23-25). He was sentenced to consecutive terms of ten years' imprisonment and a $7,500 fine on each of the substantive counts, and to five years' imprisonment, to run concurrently with the other prison terms, and a $5,000 fine on the conspiracy count (R. 818).

The evidence adduced by the Government may be summarized as follows:

In March 1949, George Faucella solicited Nicholas Frasca and Philip Schwartz, New York City lithographers, to print counterfeited American Express travelers checks, which they agreed to do for $15,000 (R. 83-85, 98, 112). At about the same time, Alexander Patrick King, at the request of Alfred Turiano, secured some genuine American Express travelers checks for use in making the counterfeited ones. King was to organize and manage a group of check passers for 30 percent of the profits. (R. 348-355.)

From the genuine checks, the lithographers made counterfeit plates with which they printed in the Southern District of New York counterfeited checks of the face value of $420,000. They also printed and turned over to Faucella several hundred counterfeited draft classification cards and drivers licenses to be used by check passers for identification purposes. Frasca and Schwartz delivered the counterfeited checks to Faucella in the latter part of July at their shop in New York City in the Southern District. (R. 85-92, 99-101, 112-114.)

Prior to the delivery of the checks, about the middle of June, Turiano and Faucella informed King that there was "a new combination" in the picture and that they could give him only ten percent. He was later promised 20 percent and per-

mitted to engage one man to work with him. He hired Patrick Joseph Finnegan as a check passer. (R. 355-357, 427-428.)

Edward Robert Larigan testified, *inter alia,* that early in August 1949, he was asked by Joseph Di Palmero and his brother, Peter, to participate in the counterfeit check-passing scheme; that as a result of his talks with the Di Palermos, he met them on the evening of August 19, 1949, at Di Polo's Restaurant in Manhattan in the Southern District, where he was escorted to a table at which petitioner and Turiano were seated; that Thomas Polo joined them; that Larigan was asked whether he had any knowledge of travelers checks and the method of cashing them, to which he replied that he had never handled them but was willing to try; that Turiano offered him 15 percent of all the checks which he cashed, to which he agreed; that, after discussing several cities, it was agreed to start the check-passing operations in Chicago; that petitioner expressed the opinion that Havana was not a good point of distribution; that Joseph Di Palermo told petitioner that he "did not have to enter the picture whatsoever," to which petitioner replied that he wanted to go along "to supervise this thing" and that, since he could not go along with the others because he had a payroll to meet in Brooklyn, he would follow later; that when the meeting was over Larigan went outside with Joseph Di Palermo; that shortly thereafter petitioner and Turiano left

together in a car; that Di Palermo than told Larigan that "if anything went wrong [Larigan] had nothing to worry about in this case and that Gillette was backing the deal" (R. 199-205, 264-266).

Larigan further testified that Saturday night, August 20, Joseph Di Palermo told him that Di Palermo and Polo had to go to Brooklyn to pick up the checks (R. 210).

The three of them, Larigan, Joseph Di Palermo and Polo took a plane for Chicago on Sunday morning, August 21, carrying the checks with them in Di Palermo's suitcase (R. 211-212). Upon their arrival in Chicago, they registered in different hotels under assumed names (R. 212).

Early Monday morning, August 22, King and Finnegan, pursuant to instructions from Turiano, arrived in Chicago and registered at a hotel under false names (R. 358, 429). Turiano arrived that afternoon and registered at the Palmer House under an assumed name (R. 213, 496).

Larigan testified that on Monday afternoon, shortly before Turiano arrived, he received a telephone call from petitioner in New York. Petitioner wanted to know if everything was all right. He said that he would arrive in Chicago late that night or early Tuesday morning. He also obtained from Larigan the name of the hotel, and the room number, at which Joseph Di Palermo was staying. (R. 216, 292-293.)

The members of the party spent Monday eve-

ning, August 22, and Tuesday, extensively preparing and planning for the check-passing operations, under the general direction of Turiano (R. 215-220, 359-365, 429-430).

On Monday evening Polo, who had the checks, failed to show up and there was general concern over his absence. Larigan testified that Turiano remarked, in connection with Polo's absence, that everything had to be ready when petitioner, who was due the following day, arrived. (R. 215.) Larigan further testified that on Tuesday afternoon, while he was in Turiano's room in the Palmer House, petitioner and Joseph Di Palermo came in; that they decided that the checks would be passed the following day (Turiano having obtained them from Polo, who supposedly had been ill); that petitioner and Di Palermo left together after remaining about five minutes, and that Turiano told him that petitioner was staying in the Palmer House two floors above his own room under the assumed name of Martini (R. 220-221). The hotel records showed that a room on that floor was registered to Frank Martini during August 22-24 (R. 498).

Tuesday night King and Finnegan, pursuant to Turiano's instructions, cashed two checks (R. 365-366, 433). Larigan testified that he signed some of the counterfeit checks in Turiano's room that night while petitioner, Turiano and Di Palermo were present and that Di Palermo told him, in petition-

er's presence, that he and petitioner had watched King and Finnegan cash a traveler's check at the air office (R. 224).

Larigan also testified that on Wednesday morning he took checks of the face value of $50,000, which he had signed, up to petitioner's room, where he found petitioner, Di Palermo and Polo; that petitioner shook hands with him and said "he did not have to tell [Larigan] what to do," and that in petitioner's presence Larigan gave Di Palermo half the checks (R. 226, 277). Because of Polo's illness, Larigan was to team up with Joseph Di Palermo in the check-passing operations. The two of them left petitioner's room with the checks and drove out to the north side to begin passing them. But by this time Larigan had made up his mind to abandon the operation because of his small percentage and Polo's illness which he believed was feigned. (R. 226, 278-279, 286.) Accordingly, upon arriving at the first bank, Larigan took two books of the counterfeit checks and, while Joseph Di Palermo remained outside with the car which had been rented, walked in one door of the bank and out another without making any attempt to cash the checks (R. 227).

In the meantime King and Finnegan had been conducting successful check-cashing operations among the banks in the business district (R. 370). As a result of Larigan's disappearance, Chicago was deemed to have outlived its usefulness, and

the party, including petitioner, hurriedly departed for Los Angeles under assumed names (R. 371-376, 435-436, 520-529). There Borda joined them and further check-passing operations were conducted (R. 379-381, 439-445).

On appeal, the Court of Appeals held "that the jury was amply justified in finding that [petitioner] became a member of the conspiracy" (R. 830). With respect to the substantive count of transporting the counterfeits from the Southern District to Chicago (count 8), the court found that, although there was "no evidence that they were within the Southern District when their interstate transportation to Chicago was planned at the meeting on August 19th" and therefore the prosecution only proved a transportation from Brooklyn, where Joseph Di Palermo got the counterfeits before boarding the plane, to Chicago, this variance between the allegations and proof was not fatal. The court ruled that petitioner could be tried in the Southern District because he counselled, aided and abetted the transportation at the August 19 meeting in that district (R. 830-831). Although holding that the trial court properly charged that the substantive crime was transporting the checks "from the State of New York to other states" and adequately instructed on aiding and abetting, the Court of Appeals said that the trial court erred in not telling the jury that it had to find some act of aiding and abetting in the Southern District, necessary to establish venue.

But it held that this error was non-prejudicial for, since the "only direct testimony linking Gillette with the transportation from New York to Chicago came from Larigan who testified as to Gillette's conduct at the meeting on August 19th, to his long distance telephone call from New York, and to his presence and conduct in Chicago," it was "highly improbable" that "the jury believed what Larigan said of Gillette's actions in Chicago" and did not believe "Larigan's testimony as to the part Gillette took in the meeting of August 19th." (R. 831-832.)

The court accordingly affirmed the convictions on counts eight and ten. But it reversed the conviction on count nine, transportation to Los Angeles, on the ground of improper venue. For "[s]o far as appears the plan to move on to Los Angeles was not conceived until Larigan's defection in Chicago." Consequently, "[n]o accessorial acts with respect to transportation of any of the checks to Los Angeles were committed by Gillette in the Southern District." (R. 831.)

On rehearing, the Court of Appeals held that, instead of it being "highly improbable that the jury did not believe Larigan's testimony as to the part Gillette took in the meeting at the restaurant in Manhattan on August 19th," "the jury necessarily found that he abetted in Manhattan the interstate transportation to Chicago" (R. 856). For under the "instructions the jury could not have

convicted Gillette on count 8 unless they found that he aided and abetted the transportation from New York to Chicago and the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th" (R. 857).

ARGUMENT

1. This Court has settled that a variance in proof from the allegations of the indictment is non-prejudicial unless it " 'affect[s] the substantial rights' of the accused." *Berger* v. *United States,* 295 U.S. 78, 82.[1] In the course of its opinion in the *Berger* case, the Court explained (295 U.S. at 82) that

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

[1] See recent cases holding variances between allegations and proof non-prejudicial: *United States* v. *Rosenblum,* 176 F. 2d 321, 324 (C.A. 7), certiorari denied, 338 U.S. 893; *United States* v. *Fried,* 149 F. 2d 1011 (C.A. 2), certiorari denied, 326 U.S. 756; *United States* v. *Cohen,* 145 F. 2d 82, 89 (C.A. 2), certiorari denied, 323 U.S. 799; *Cromer* v. *United States,* 142 F. 2d 697 (C.A.D.C.), certiorari denied, 322 U.S. 760; *Harris* v. *United States,* 140 F. 2d 567 (C.A. 4).

Petitioner does not maintain that he was misled in preparing his defense or that he was surprised by the evidence offered against him, as he could not. The proof conformed with the indictment as to the counterfeited checks transported and the time of their transportation. The only variance was that the counterfeits directly began their interstate trip to Chicago in the Eastern rather than the Southern District of New York. But the checks were made in Manhattan and were previously transported from there to Brooklyn. Petitioner and others also planned the transportation to Chicago in Manhattan. It is therefore evident that petitioner was fully aware that the offense with which he was charged was the very one of which he was convicted, and that he was not surprised by the evidence offered against him.

Nor does petitioner contend that the conviction places him in danger of second jeopardy for the same offense. Because of the similarity between the allegations and proof, and the fact that the counterfeits were previously transported from Manhattan to Brooklyn, he is not in danger of being convicted again for the transportation to Chicago. He has not shown that the variance affected his substantial rights. The variance and the trial court's instructions in connection therewith are significant only with respect to the question of venue—whether petitioner could be tried in the Southern District.

2. In that connection, petitioner's prime complaint (Pet. 8-10, 15-25) is that while the jury is not shown to have so found, the court below found as a fact that petitioner committed accessorial acts in the Southern District of New York. The short answer to that charge is that the record makes it quite clear that the jury did find that fact.

This appears from the opinions below and it is unnecessary here to repeat the analysis there made. Moreover, the matter is put beyond doubt by the instructions given by the trial court to the jury, at the request of petitioner's counsel, with respect to the conspiracy count. The trial court instructed that (R. 769):

> * * * The only direct evidence connecting Gillette with the alleged conspiracy is that he sat in on the meeting in the testimony of the witness Larigan. There is other testimony, however, as to his being in Chicago and being in Los Angeles, and the jury may consider those facts in connection with the testimony of the witness Larigan, and if those help them in determining that Larigan was or was not telling the truth, they may use those bits of testimony.

This instruction plainly meant that the jury must, in order to convict petitioner on the conspiracy count, believe Larigan's testimony concerning the August 19 meeting, and that the other evidence could only be used to test Larigan's credibility.

The jury's conviction on count ten was, therefore, a finding that Larigan's testimony concerning the August 19 meeting was true.

It follows that this case does not fall within the rule of *Bollenback* v. *United States,* 326 U. S. 607, relied on by petitioner (Pet. 8, 17-18). There is here no attempt to substitute a judicial appraisal of evidence for a jury finding. For, as has been shown, the jury did find the crucial fact— that petitioner aided and abetted the interstate transportation in the Southern District of New York.

3. Given such a finding, there is no question that petitioner's conviction, to the extent affirmed by the court below, must stand. Section 2 of Title 18 makes anyone who aids, abets or counsels the commission of an offense a principal. An accessory before the fact may, therefore, be charged with and convicted of the substantive offense; he need not be charged as an aider and abetter in order to convict him as such. *Nye & Nissen* v. *United States,* 336 U. S. 613, 618-620; *Von Patzoll* v. *United States,* 163 F. 2d 216 (C. A. 10), certiorari denied, 332 U. S. 809; *United States* v. *Knickerbocker Fur Coat Company,* 66 F. 2d 388, 390 (C. A. 2), certiorari denied *sub nom. Zuckerkandel* v. *United States,* 290 U. S. 673; *Cochran* v. *United States,* 41 F. 2d 193, 197 (C. A. 8); *Collins* v. *United States,* 20 F. 2d 574, 578 (C. A. 8). Accordingly, count eight of the indictment, in charging peti-

tioner with the substantive offense of interstate transportation of the counterfeits, also charged him with aiding and abetting the transportation. Indeed, count eight specifically referred to Section 2, as well as the section defining the substantive offense (R. 23).

The trial court, moreover, instructed the jury fully with respect to aiding and abetting (R. 754-755):

> In this case the charge of transportation, of course, will include causing to be transported or aiding or abetting. It is not necessary for a jury to find that A himself picked up a forged or counterfeit paper, check, or security and himself carried it in his hand from New York to Chicago or Los Angeles or some other place. But if he caused it to be done or aided or abetted in it, then he is equally as guilty as the person who carried the paper or the books or the suitcase in which these securities were carried from one state to another. In other words, ladies and gentlemen, one may act through another. I may scheme or devise to commit a crime and I may have you carry some of it out, and you and I are both guilty provided I actually knew and took part in causing you to take the securities from one state to another. I can act through you or you can act through me, and provided there was knowledge and intention to have the crime committed, we are guilty. The passive actor is as guilty as the active actor.

The jury verdict that followed upon these instructions is not to be set aside because the direct interstate transportation itself began in the Eastern District and not the Southern. For while Section 2 provides that one who "aids, abets, counsels, commands, induces or procures" the commission of an offense may be prosecuted and convicted as a principal, the Section actually establishes the common law offenses of accessories before and at the fact.[2] See *Eley* v. *United States,* 117 F. 2d 526, 528 (C. A. 6); *Cochran* v. *United States,* 41 F. 2d 193, 197-198 (C. A. 8); *Greenberg* v. *United States,* 297 Fed. 45, 48-49 (C. A. 8). Manifestly, an accessory is punished for his own acts of aiding, abetting or procuring the commission of the offense and not for the acts of another who committed the substantive offense.

At common law an accessory could only be tried where his accessorial acts took place. See opinion of court below and cases cited (R. 830-831). Since Section 2 makes an accessory punishable as a principal, he can now be tried where the substantive offense was committed, but that Section, as the court below held (R. 831), does not supersede the established common law venue, which unquestionably is contained in the general venue provision, Rule 18, F. R. Crim. P.

No reason appears why Section 2 should be con-

[2] The next section (18 U.S.C. 3) defines the offense of "accessory after the fact."

strued to eliminate the prosecution of an offender in the district where he actually aided or abetted a substantive offense committed elsewhere. This Court in *United States* v. *Johnson,* 323 U. S. 273, stressed the important policy considerations behind the requirement that an accused be tried where he committed his illegal acts. Those considerations support the conclusion that an aider and abettor may be tried where his accessorial acts were committed. Undoubtedly, Congress, in passing Section 2, deviated from that policy so that the prosecution could try all parties to the offense at once. But the enactment of this section for the convenience of the Government does not indicate an intention to eliminate a venue, should the Government choose to proceed there, which will better protect the interests of the defendant.

4. Petitioner contends that it was prejudicial error to permit Larigan to testify that, in petitioner's absence, he "was told by Joseph Di Palermo [a co-conspirator] that if anything went wrong [he] had nothing to worry about in this case and that Gillette was backing the deal" (Pet. 26-29). It is not disputed that declarations of a conspirator, made while the conspiracy is in progress for the purpose of furthering the conspiracy, are admissible against a co-conspirator. *United States* v. *Cohen,* 145 F. 2d 82, 89 (C.A. 2); *United States* v. *Dennis,* 183 F. 2d 201, 230 (C.A. 2), af-

firmed, 341 U. S. 494. Petitioner, however, maintains that the declaration in this case was not made in furtherance of the conspiracy but was only a narrative conclusion (Pet. 27). The facts of the case do not support his position; they show that the declaration was the very kind intended to be included in the rule.

Prior to the admission of the statement in evidence, there was, as the court below held (R. 832), ample evidence of the existence of the conspiracy and of petitioner's participation therein. Di Palermo made the statement immediately following the August 19 meeting at which Larigan had agreed to act as a check passer. The only purpose which we can see for making the statement was to encourage Larigan to remain in the conspiracy. Petitioner's contention that Larigan needed no encouragement (Pet. 28) is refuted by his later abandonment of the check-passing operations. Although Larigan had previously passed small personal checks, he had never had any experience with travelers checks, and his conduct shows that he was afraid that the wholesale check-passing operations would be unsuccessful. In any event, to establish the admissibility of declarations of coconspirators, it is not essential that they actually be needed to further the conspiracy so long as they are made for that purpose.

Petitioner's argument that the statement did not further the interstate transportation of the checks,

and, therefore, did not further the illegal conspiracy (Pet. 27) is without merit. For the conspirators would not have transported the checks to Chicago unless they were assured of check-passers to dispose of them there. For this reason, the statement, made to encourage Larigan to act as a check-passer in Chicago, was an act directly in furtherance of the conspiracy and as such admissible. *United States* v. *Chiarella,* 184 F. 2d 903 (C.A. 2).

In any event, the court instructed the jury that the statement was not to be used to prove the conspiracy, but was only pertinent, if the jury concluded "on other testimony that there was such a conspiracy," "as to the facts occurring in furtherance of the conspiracy" (R. 757). As pointed out in the *Dennis* case, *supra,* with respect to similar instructions, "these instructions in effect altogether withdrew the declarations from the jury" (183 F. 2d at 231). Consequently, the admission of the testimony, even if erroneous, was non-prejudicial.

CONCLUSION

There was no prejudicial error, the decision of the court below is correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 962649 108

Office-Supreme Court, U.S.
FILED
SEP 29 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM—1951

No. 188

GEORGE GILLETTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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